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# Sovereign immunity in the enforcement of awards against States

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# Transnational Notes

## Sovereign Immunity in the Enforcement of Awards Against States

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***Democratic Republic of Congo and ors v FG Hemisphere Associates LLC***

To most clients a judgment or an arbitral award is only worth the paper it is written if it can be enforced. Enforcement of judgments and arbitration awards against States poses particular challenges. In the former context, the English Supreme Court recently provided guidance in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 ("*Argentina*"). In the latter context, the difficulties are exemplified by the epic 3:2 decision of the Hong Kong Court of Final Appeal in *Democratic Republic of Congo v FG Hemisphere Associates LLC*, FACV Nos. 5, 6 & 7 of 2010 ("*Congo*"). Both cases saw "vulture funds" seeking to enforce a judgment or an award against a sovereign.

While the fund in *Argentina* drew blood, the fund in *Congo* drew a blank. The Hong Kong Court of Final Appeal held that a State enjoys absolute immunity from enforcement proceedings in Hong Kong. While *Congo* has already enjoyed its fair share of coverage elsewhere, this brief note sets out some thoughts on what the comparative position in Singapore is, and what the practical effects of the decision are for practitioners advising clients between Singapore and Hong Kong as a potential seat of arbitration.

**Facts**

In 2003, an engineering company Energoinvest obtained two ICC awards against Congo. Energoinvest transferred the benefit of the awards to a US distressed debt fund, FG Hemisphere Associates. FG sought to enforce the awards in Hong Kong. Congo resisted enforcement mainly on the grounds of State immunity. One of the

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issues confronting the Court of Final Appeal was whether Hong Kong applied the doctrine of:

(a) absolute immunity, where the domestic courts of one State would not normally have jurisdiction to adjudicate upon matters in which another State is named as defendant unless there is a waiver; or

(b) restrictive immunity, which recognizes that States do not enjoy immunity from suit when they are engaged in purely commercial transactions, and do not enjoy immunity from execution if the relevant assets are used for a commercial purpose.

Countries such as Australia, US and the UK have adopted the latter, whereas China adheres to the former.

Despite vigorous dissents by Bokhary PJ and Mortimer NPJ which saw the former opening his judgment with characteristic flourish on judicial independence, the majority of the Court of Final Appeal (Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ) held, *inter alia*, that because Hong Kong could not have a doctrine of state immunity that was inconsistent with China, the doctrine of absolute immunity applied. A foreign State is immune from suit, enforcement and execution in Hong Kong, unless waived by that State. An effective waiver is made by an unequivocal submission "in the face of the court". Written waiver clauses, including jurisdiction clauses and arbitration agreements, do not constitute good waiver. Because the Court of Final Appeal found no waiver by Congo, the awards in question could not be enforced. This ruling was upheld upon referral to the Standing Committee of China's National People's Congress.

The same principle applies to Crown immunity, which concerns whether a State government or a State entity is able to raise immunity before its own courts. The Hong Kong Court of First Instance held that the PRC government and PRC state entities enjoy absolute Crown immunity before Hong Kong courts: *Intraline Resources Sdb Bhd v The Owners of the Ship or Vessel Hua Tian Long* HCAJ 59/2008.

**Whither Singapore?**

The Singaporean position concerning sovereign immunity is codified in the State Immunity Act (Cap 313, 1985 Rev. Ed.). The relevant provision concerning arbitration is section 11, which very simply provides as follows:

> ***Arbitrations.***

> ***11.*** *—(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.*
>
> *(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.*

In the second reading of the State Immunity Bill (Hansard Vol. 39, 7 Sep 1979, Col 408 – 409), the Minister said that the Bill was meant to move Singapore away from the doctrine of absolute immunity, which according to the Minister, had been the "subject to a great deal of criticism" before the UK courts and the Privy Council. The Bill deliberately mirrored the UK State Immunity Act 1978 shorn of the provisions concerning the European Convention on State Immunity.

Consequently, Section 11 of Singapore's State Immunity Act is in *pari materia* with section 9 of the UK State Immunity Act 1978. While the former has yet to see any action, section 9 of the UK Act came under scrutiny in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and anor* [2006] EWCA Civ 1529 ("*Svenska*").

In that case, Svenska sought to enforce an ICC award in England against Lithuania. Counsel for Lithuania argued that section 9 of the UK Act is concerned only with proceedings relating to the conduct of the arbitration itself and does not extend to proceedings to enforce any award which may result from it. Moore-Bick LJ rejected this interpretation. His Lordship was of the view that "if a State has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective" and that an application for leave to enforce an award is one aspect of the recognition of an award and "is the final stage in rendering the arbitral procedure effective". Execution on property belonging to the State comes under section 13 of the UK Act (mirrored by section 15 of the Singapore Act), which provides that execution on property belonging to a State can only be in respect of property "which is for the time being in use or intended for use for commercial purposes".

Moore-Bick LJ also quoted the Lord Chancellor in the course of Parliamentary debates over the relevant provision, who explicitly said that the provision was "intended to remove the immunity currently enjoyed by States from proceedings to enforce arbitration awards against them".

The intent of the English Parliament therefore could not have been clearer. In choosing to enact the English Act as law in Singapore, the intent of the Singapore legislature is unlikely to differ. Consequently, if a *Congo* situation arises in Singapore *Svenska* is likely to be highly persuasive. If this is accepted, this means that in Singapore, unlike Hong Kong, a foreign State is unable to claim immunity against award enforcement proceedings. To be complete, any subsequent execution pursuant to a successful award enforcement proceeding against a foreign State can only be on State property "being in use or intended for use for commercial purpose".

**Practical implications**

One thing is now clear. Practitioners dealing with State counterparties should be slow to adopt a Hong Kong court jurisdiction clause since a State enjoys absolute immunity in Hong Kong. Conversely, State parties may be attracted to Hong Kong as a safe haven to transfer their assets.

Practitioners in Hong Kong are taking pains to explain that *Congo* has little impact on Hong Kong's attractiveness as a seat of arbitration. That is because the decision does not affect in any way an arbitral tribunal's jurisdiction over a State who is party to an arbitration agreement. An arbitration award rendered anywhere in the world, be it Singapore or Hong Kong, will encounter the same hurdle concerning sovereign immunity when sought to be enforced in Hong Kong.

Would the result in Hong Kong be different if the foreign State against which an award is rendered is also party to the New York Convention? China is a signatory to the Convention, Congo is not. The Hong Kong Court of Appeal suggested that, if an award against a foreign State which is signatory to the New York Convention is sought to be enforced in Hong Kong, that may amount to an effective waiver in the form of consent given in an international treaty.

That proposition remains to be tested. It has been pointed out that the New York Convention arguably imposes upon State signatories only an obligation to recognize and enforce foreign arbitral awards — that does not *ipso facto* translate into a representation by

signatory States that any immunity enjoyed will be waived. The drafting history of the New York Convention does not appear to suggest otherwise. The title of the Convention itself underscores this point: it is the Convention on the Recognition and Enforcement of *Foreign* Arbitral Awards.

Another open and perhaps more pertinent point concerns the status of an arbitration seated in Hong Kong involving a foreign State party. Will the Hong Kong courts enjoy supervisory jurisdiction over that arbitration? Practitioners observe that an arbitration clause is generally accepted as an implied waiver of immunity under customary international law. That was the view of Lady Hazel Fox CMG QC in her treatise cited by the Hong Kong Court of Appeal in *Congo*. But until this point is tested before the Hong Kong courts, a non-State party runs the risk of not being able to seek the judicial assistance of the Hong Kong courts in aid of an arbitration against a State party seated in Hong Kong. Even if the Hong Kong courts ultimately rule on this issue affirmatively, the delay and expense that may ensue from a State party challenging the supervisory jurisdiction of the Hong Kong courts may effectively render moot any judicial measure that was being sought, particularly if such measures are time-sensitive. To that extent parties may prefer the speed and certainty Singapore provides, *ceteris paribus*.

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